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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/811,695

Filing Date: March 29, 2004

Appellant(s): KLINE ET AL.

Charles R. Ware
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed November 11, 2010 appealing from the Office action mailed May 14, 2010.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 21-23, 25-27, 29-33, 35, 36, 39 and 40 are rejected.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

5,221,274	BUELL ET AL	06-1993
WO 97/47264 A1	LODGE ET AL	12-1997

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1. Claims 21, 22, 25, 26, 29, 31, 32, 35, 36 and 39 are rejected under 35 U.S.C. 102(b) as being anticipated by Lodge (WO 97/47264 A1).

With respect to **claim 21**: Lodge discloses a front-fastenable disposable wearable absorbent article, diaper 40, comprising the following: a longitudinal axis; and a back waist region 74 that includes: a first side ear on a first side of the longitudinal axis; a second side ear on a second side of the longitudinal axis; and an intermediate stretch region, elongated zone 52, disposed primarily in the back waist region 74 (inasmuch as the zone is triangular and the majority of the area of the triangle is disposed in the back waist region) between the side ears and necessarily having an intermediate lateral tensile modulus; wherein the first side ear includes a first fastener and a first side ear stretch region having a first side ear lateral tensile modulus that is greater than or about equal to the intermediate lateral tensile modulus. (Fig. 17, Page 21, lines 13-30)

With respect to **claim 22**: The first side ear lateral tensile modulus is greater than the intermediate lateral tensile modulus. Both the first side ear and intermediate region are defined by the backsheet, however the intermediate region 52 has incrementally stretched regions 54 which are more readily elongated as a result of the incremental stretching process and therefore by their nature has a tensile modulus less than the first side ear that does not have such

incrementally stretched zones or materials, i.e. the first side ear has a tensile modulus greater than the intermediate region tensile modulus.

With respect to **claim 25**: The second side ear lateral tensile modulus disclosed by Lodge is greater than the intermediate lateral tensile modulus. Both the second side ear and intermediate region are defined by the backsheet, however the intermediate region 52 has incrementally stretched regions 54 which are more readily elongated as a result of the incremental stretching process and therefore by their nature has a tensile modulus less than the second side ear that does not have such incrementally stretched zones or materials, i.e. the second side ear has a tensile modulus greater than the intermediate region tensile modulus.

With respect to **claim 26**: Lodge discloses a first side ear lateral tensile modulus and a second side ear lateral tensile modulus that are each greater than the intermediate lateral tensile modulus for reasons stated *supra* with respect to claims 22 and 25.

With respect to **claim 29**: The intermediate stretch region 52 contains a formed substrate 80 that is included in a backsheet of the article inasmuch as it is simply an incrementally stretched portion of backsheet 26. (Page 11, lines 15-19, Page 12, lines 25-29)

With respect to **claim 31**: Lodge discloses a pant-type disposable wearable absorbent article, diaper 40, comprising the following: a longitudinal axis; and a first side panel on a first side of the longitudinal axis; a second side panel on a second side of the longitudinal axis; and an intermediate stretch region, elongated zone 52, disposed primarily in a back waist region 74 (inasmuch as the zone is triangular and the majority of the area of the triangle is disposed in the

back waist region) between the side panels and necessarily having an intermediate lateral tensile modulus; wherein the first side panel includes a first side panel stretch region having a first side panel lateral tensile modulus that is greater than or about equal to the intermediate lateral tensile modulus. Both the first side ear and intermediate region are defined by the backsheet, however the intermediate region 52 has incrementally stretched regions 54 which are more readily elongated as a result of the incremental stretching process and therefore by their nature has a tensile modulus less than the first side ear that does not have such incrementally stretched zones or materials, i.e. the first side ear has a tensile modulus greater than the intermediate region tensile modulus.

With respect to **claim 32**: The first side panel lateral tensile modulus disclosed by Lodge is greater than the intermediate lateral tensile modulus. Both the first side ear and intermediate region are defined by the backsheet, however the intermediate region 52 has incrementally stretched regions 54 which are more readily elongated as a result of the incremental stretching process and therefore by their nature has a tensile modulus less than the first side ear that does not have such incrementally stretched zones or materials, i.e. the first side panel has a tensile modulus greater than the intermediate region tensile modulus.

With respect to **claim 35**: The second side ear lateral tensile modulus disclosed by Lodge is greater than the intermediate lateral tensile modulus. Both the second side ear and intermediate region are defined by the backsheet, however the intermediate region 52 has incrementally stretched regions 54 which are more readily elongated as a result of the incremental stretching process and therefore by their nature has a tensile modulus less than the second side ear that

does not have such incrementally stretched zones or materials, i.e. the second side ear has a tensile modulus greater than the intermediate region tensile modulus.

With respect to **claim 36**: Lodge discloses a first side ear lateral tensile modulus and a second side ear lateral tensile modulus that are each greater than the intermediate lateral tensile modulus for reasons stated *supra* with respect to claims 32 and 35.

With respect to **claim 39**: The intermediate stretch region 52 contains a formed substrate 80 that is included in a backsheet of the article inasmuch as it is simply an incrementally stretched portion of backsheet 26. (Page 11, lines 15-19, Page 12, lines 25-29)

2. Claims 21, 29, 30, 31, 39 and 40 are rejected under 35 U.S.C. 102(b) as being anticipated by Buell et al (U.S. Patent No. 5,221,274).

With respect to **claim 21**: Buell discloses a front-fastenable disposable wearable absorbent article 20, comprising: a longitudinal axis; and a back waist region 58 that includes: a first side ear on a first side of the longitudinal axis; a second side ear on a second side of the longitudinal axis; and an intermediate stretch region, namely an elastic waist feature 34 including elastomeric member 76, disposed primarily in the back waist region 58 between the side ears 70 and necessarily having an intermediate lateral tensile modulus; wherein the first side ear includes a first fastener and a first side ear stretch region having a first side ear lateral tensile modulus that is greater than or about equal to the intermediate lateral tensile modulus. Examiner's position is based upon Buell's disclosure that the elastic waist feature contains both the backsheet material and an elastomeric material 76 whereas the first side ear contains only

the backsheet and topsheet materials and a positioning patch 50 or 650 that imparts additional stiffness to reduce folding during wear. ('274, Col. 51, line 65 - Col. 52, line 11) An elastomeric material by its nature has a lower tensile modulus than a non-elastomeric material, thus the first side ear, together with the stiffness-imparting positioning patch 50/650 necessarily has a higher tensile modulus than the intermediate region.

With respect to **claim 29**: The intermediate stretch region 34 disclosed by Buell is included in a backsheet of the article inasmuch as it is attached thereto.

With respect to **claim 30**: Buell discloses that an elastomeric element is attached to the backsheet in the intermediate stretch region 34.

With respect to **claim 31**: Buell discloses a front-fastenable disposable wearable absorbent article 20, comprising: a longitudinal axis; a first side panel 70 on a first side of the longitudinal axis; a second side panel 70 on a second side of the longitudinal axis; and an intermediate stretch region, namely an elastic waist feature, disposed in a back waist region 58 between the side panels and necessarily having an intermediate lateral tensile modulus; wherein the first side ear includes a first fastener and a first side panel stretch region having a first side panel tensile modulus that is greater than or about equal to the intermediate lateral tensile modulus. Examiner's position is based upon Buell's disclosure that the elastic waist feature contains both the backsheet material and an elastomeric material 76 whereas the first side ear contains only the backsheet and topsheet materials and a positioning patch 50 or 650 that imparts additional stiffness to reduce folding during wear. ('274, Col. 51, line 65 - Col. 52, line 11) An elastomeric material by its nature has a lower tensile modulus than a non-elastomeric material, thus the first

side ear, together with the stiffness-imparting positioning patch 50/650 necessarily has a higher tensile modulus than the intermediate region.

With respect to **claim 39**: The intermediate stretch region 34 disclosed by Buell is included in a backsheet of the article inasmuch as it is attached thereto.

With respect to **claim 40**: Buell discloses that an elastomeric element is attached to the backsheet in the intermediate stretch region 34.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Appellant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).
4. Claims 23, 27 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lodge (WO 97/47264 A1).

With respect to **claim 23**: Examiner is interpreting "about equal" in a manner consistent with the specification as that term is understood from the specification, i.e. the difference is between greater than 0 and 5% (Specification, page 23, paragraph 3) The first side ear lateral tensile modulus is about equal to the intermediate lateral tensile modulus. Lodge discloses that the intermediate zone is simply the backsheet 26 incrementally stretched in only the intermediate region to define a formed substrate 80. Lodge does not explicitly disclose a first side ear tensile modulus about equal to the intermediate region tensile modulus. However it is examiner's position that the incremental stretching process would produce a tensile modulus that is about equal to that of the rest of the backsheet as that term is understood because the process only produces elastic-like behavior by elongating the substrate rather than replacing the material with a genuinely elastic material, thus the difference in tensile moduli between the first side ear and intermediate region would fall in the range used herein when interpreting "about equal". Therefore it would be obvious to one of ordinary skill in the art to modify the article of Lodge such that the incremental stretching process yields a first side ear tensile modulus that is about equal to the intermediate region tensile modulus with a reasonable expectation of success, which would ensure a more uniform response to stretching during wear.

With respect to **claim 27**: Examiner is interpreting "about equal" in a manner consistent with the specification as that term is understood from the specification, i.e. the difference is between greater than 0 and 5% (Specification, page 23, paragraph 3) The first and second side ear lateral tensile moduli are each about equal to the intermediate lateral tensile modulus. Lodge discloses that the intermediate zone is simply the backsheet 26 incrementally stretched in only the intermediate region to define a formed substrate 80. Lodge does not explicitly disclose a first

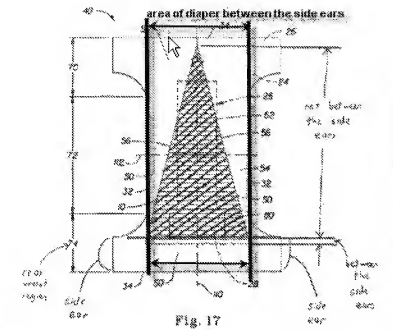
or second side ear tensile modulus about equal to the intermediate region tensile modulus. However it is examiner's position that the incremental stretching process would produce a tensile modulus that is about equal to that of the rest of the backsheet as that term is understood because the process only produces elastic-like behavior by elongating the substrate rather than replacing the material with a genuinely elastic material. Thus the difference in tensile moduli between the first or second side ear and intermediate region would fall in the range used herein when interpreting "about equal". Therefore, it would be obvious to one of ordinary skill in the art to modify the article of Lodge such that the incremental stretching process yields first and second side ear tensile moduli that are each about equal to the intermediate region tensile modulus with a reasonable expectation of success, which would ensure a more uniform response to stretching during wear.

With respect to **claim 33**: Examiner is interpreting "about equal" in a manner consistent with the specification as that term is understood from the specification, i.e. the difference is between greater than 0 and 5% (Specification, page 23, paragraph 3) The first side panel lateral tensile modulus is about equal to the intermediate lateral tensile modulus. Lodge discloses that the intermediate zone is simply the backsheet 26 incrementally stretched in only the intermediate region to define a formed substrate 80. Lodge does not explicitly disclose a first side ear tensile modulus about equal to the intermediate region tensile modulus. However it is examiner's position that the incremental stretching process would produce a tensile modulus that is about equal to that of the rest of the backsheet as that term is understood because the process only produces elastic-like behavior by elongating the substrate rather than replacing the material with a genuinely elastic material, thus the difference in tensile moduli between the first side ear and intermediate region would fall in the range used herein when interpreting "about equal".

Therefore it would be obvious to one of ordinary skill in the art to modify the article of Lodge such that the incremental stretching process yields a first side ear tensile modulus that is about equal to the intermediate region tensile modulus with a reasonable expectation of success, which would ensure a more uniform response to stretching during wear.

(10) Response to Argument

Appellant's arguments filed November 11, 2010 have been fully considered but they are not persuasive. As to the argument regarding the rejection of independent claims 21 and 31 under 35 U.S.C. 102 as anticipated by Lodge, appellant argues that Lodge does not disclose an intermediate stretch region disposed primarily in the back waist region between the side ears. The appellant is referred to Fig. 17 included in the "Arguments" section of said brief. Claim 1 only requires that the intermediate stretch region be located between the side ear or side panels, rather than a certain portion of the zone being between the side ears. However, it is the examiner's position that Fig. 17 clearly shows that all of zone 52 is disposed between the side ears. The examiner has provided an annotated version of the version of Fig. 17 of Lodge originally annotated by the appellant below to show what is actually required by the claims for comparison.



As to the argument regarding the rejection of claim 21 under 35 U.S.C. 102 as anticipated by Buell, waist feature 34 includes elastomeric member 76 and waist feature 34 is present in both waist regions. This position is supported by Fig. 1 of Buell which shows elastomeric member 76 present in the back waist region 58.

Appellant's arguments with regard to dependent claims 24, 27 and 33 as unpatentable over Lodge have been fully considered but are not persuasive, as appellant's arguments depend entirely on arguments regarding the rejection of claim 21 as anticipated by Lodge, which have been addressed *supra*.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Melanie J Hand/

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